HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Civil Revision No: 361 of 1999

Judgment reserved on:07.09.2006

Date of decision: 12th September, 2006

Mathi Devi and others ..Petitioners

Versus

Dharam Dass and others ..Respondents

Coram:

The Hon'ble Mr.Justice Deepak Gupta, J.

Whether approved for reporting: No

For the Petitioner: Ms. Seema Guleria, Advocate

For the respondents :Mr.G.D.Verma, Senior Advocate with Mr.B.C.Verma, Advocate

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Deepak Gupta, J.

Khewan Ram, the predecessor-in-interest of the present petitioners filed a suit through his attorney, Amar Dass against Dharam Dass, predecessor-in-interest of the present respondents. Amar Dass was the brother of Khewan Ram. Amar Dass died sometime in July, 1995 and thereafter the plaintiff, Khewan Ram appointed Hinender Kumar, son of Amar Dass, as his attorney.

The suit was filed in January, 1993 and issues were framed on 7.9.1994. Hinender Kumar appeared as a witness of the plaintiffs on 8.4.1996. When his statement

was being recorded, counsel for the defendants pointed out that defendant Dharam Dass had died. Immediately thereafter on 18.4.1996 an application was moved under Order 22 Rule 4 C.P.C. by Haninder Kumar, the new attorney, for bringing on record the legal representatives of deceased-defendant Dharam Dass alongwith an application under Section 5 of the Limitation Act read with Order 22 Rule 9 C.P.C. for condoning the delay in filing the application.

Admittedly, Dharam Dass had died in March, 1995. It is also the admitted case that the plaintiffs as well as both his attorneys were aware about his death. According to the case set out in the application, Amar Dass, the previous attorney was not keeping good held and, therefore, could not instruct his counsel about the death of the defendant. In the application for condonation of delay, it was submitted that the plaintiffs remained under the impression that Amar Dass, the previous attorney, must have informed the counsel about the death of the defendant.

This application was contested on various grounds. The learned trial court held that the plaintiffs were aware about the death of defendant Dharam Dass

and there was no ground for condoning the delay and the suit was dismissed as having abated. The present petitioners challenged the order before the learned District Judge, Shimla who, vide the impugned judgment, affirmed the order of the trial court. Hence the present revision petition.

I have heard Ms.Seema Guleria, learned counsel for the petitioners as well as Mr.G.D.Verma, learned Senior counsel for the respondents.

There can be no manner of doubt that the petitioners were aware about the death of the defendant since they were neighbours. In fact the petitioners have not denied this fact also. Ms.Seema Guleria, Advocate, argues that the courts below have taken a very technical view and that the plaintiff always remained under the impression that his attorney must have taken steps and even the second attorney Haninder Kumar had not realized that his father Amar Dass had not taken any steps for bringing on record the legal representatives. She submits that the suit should be decided on merits and the approach of the court in such matters should be liberal. On the other hand, Mr.G.D.Verma, learned Senior Counsel appearing on behalf of the respondents, submits

that there is no jurisdictional error in the judgment of both the courts below. He urges that this court exercising revisional powers should not interfere in the discretion exercised by the courts below and he lastly submits that in fact no prayer for setting aside the abatement was made by the petitioners in their application and thus the abatement cannot be set aside.

I have carefully gone through the entire record of the case.

No doubt in both the applications there is no specific prayer that the abatement should be set aside. However, the application has been made under Section 5 of the Limitation Act read with Order 22 Rule 9 (2) C.P.C. which shows that the application was for setting aside the abatement. The applications are drafted by the counsel and not by the parties and a party should not suffer for the fault of its counsel.

With regard to condoning the delay in bringing on record the legal representatives, no doubt the courts below have exercised a discretionary power. However, this discretion must be exercised in a just and reasonable manner and any arbitrary or pernicious exercise of

discretion is liable to be set aside in revisional proceedings.

The apex court in **Collector, Land Acquisition, Anantnag and another Vs. Mst. Katiji and others AIR 1987 SC 1353** had held that the approach of the courts should be liberal while considering the application for condonation of delay. The apex court had held as follows:-

> "1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
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> 2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
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> 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay ? The doctrine must be applied in a rational common sense pragmatic manner.
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> 4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

In another judgment reported in **Sardar Amarjit Singh Kalra (Dead) By LRs. And others Vs. Pramod Gupta (Smt)(Dead) By LRs and others (2003) 3 SCC 272** a Constitution Bench of the apex court while dealing with a similar question has laid down the law in the following terms:-

"26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination in an effective adjudication and not

> to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain intact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice."

The trend in recent years has been that the matters should not be disposed of on technical grounds and the parties should fight the case on merits. The approach of both the courts below has been rather technical and keeping in view the law laid down by the apex court, I am of the view that the delay in filing the application for bringing on record the legal representatives has to be condoned and the abatement of the suit is liable to be set aside. Consequently, the orders of the court below are set aside. The abatement of the suit is set aside and the legal representatives of the deceased, Dharam Dass are ordered to be brought on record. The legal representatives of Khewan Ram have been brought on record during the pendency of this revision petition and this shall enure for the benefit of the suit also. Keeping in view the fact that the original suit

was filed in the year 1993, it is directed that the trial court shall decide the suit as expeditiously as possible and in any event not later than 30th June, 2007. The parties through their counsel shall appear before the trial court on 11th October, 2006. The Registry shall ensure that the record is sent to the trial court well before the said date. No order as to costs.

September 12, 2006(K) (Deepak Gupta), Judge